No. 15885

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES H. RUTHERFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition to Review a Decision of the United States District Court.

APPELLANT'S OPENING BRIEF.

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Statement of the Case.

This is an appeal from the judgment of conviction made by the United States District Court adjudging the appellant guilty of violating Title 26, United States Code, Section 7203 (willful failure to register and to pay occupational tax), and from the order denying appellant's motion for a new trial [Tr. of Rec. p. 39].

Appellee filed an Information in the United States District Court, Southern District Court of California, Central Division, No. 26177-Crim. CD, against Charles H. Rutherford, the appellant, charging that during the period beginning July 1, 1957 and up to and including August 15, 1957, the appellant, Charles H. Rurtherford, engaged in the business of accepting wagers with respect to horse races and received wagers with respect to horse races within the meaning of Title 26, United States Code, Sec-

tion 4401C, and that by reason thereof he was required by law to register and pay the occupational tax (wagering) as required by Sections 4411 and 4412 of the Internal Revenue Code, 1954, and that he did wilfully and knowingly fail to register and to pay said tax in violation of Title 26, United States Code, Section 7203 [Tr. of Rec. pp. 3-4].

That appellant filed a Motion for Bill of Particulars [Tr. of Rec. pp. 4-7], and an order was made granting a Bill of Particulars [Tr. of Rec. pp. 8-9], that the Bill of Particulars was furnished by the appellee [Tr. of Rec. pp. 9-18].

That appellant filed a Motion for Return of Personal Property and to Suppress Evidence [Tr. of Rec. pp. 18-22], which was denied by the Court [Tr. of Rec. p. 34].

That the appellant, together with co-defendants Howard Cupp and Monica Kissel, proceeded to trial by the Court without a jury; that the charges (failing to pay a wagering occupational tax) against co-defendant Monica Kissel were dismissed on motion of the United States Attorney [Tr. of Rec. p. 44]; and co-defendant Howard Cupp was adjudged not guilty [Tr. of Rec. pp. 43-44]; and the appellant was adjudged guilty [Tr. of Rec. p. 37].

Appellant's motion for a new trial [Tr. of Rec. pp. 35-36] was denied by the Court [Tr. of Rec. p. 37] and it was adjudged that the appellant pay a fine in the sum of $2500.00 [Tr. of Rec. p. 38].

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1291. The pleadings relied on are the Information, Motion for Bill of Particulars, Motion for Return of Personal Property and to Suppress Evidence,

Motion for New Trial, Notice of Appeal, and Condensed Narrative Statement of Testimony [Tr. of Rec. pp. 3-4, 4-7, 18-22, 35-37, 39, 43-45].

Statement of Facts.

Appellant did not register or pay a wagering occupational tax required of one engaged in the business of accepting and receiving wagers with respect to horse races.

On several occasions between July 25, 1957 and August 15, 1957, the appellant was seen by Federal agents and Los Angeles County deputy sheriffs driving into an auto park adjoining Mark's Restaurant in Compton at approximately 6:00 P. M. On these occasions he would meet Howard Cupp, who approached the appellant's automobile and handed him a rolled up package of papers.

On some occasions Monica Kissel met Howard Cupp at the place designated and received from him a rolled up package of papers.

On one occasion an unidentified woman met the appellant at the place designated and handed him a package of rolled up papers.

On August 15, 1957 at approximately 6:00 to 6:15 P. M. the appellant was seen by a deputy sheriff at the same auto park meeting Cupp and a package passing from Cupp to the appellant; shortly thereafter Federal Agent Katayama knocked on the door of Apartment F, 110 North Burris, Compton, California, and said "Open up. We are federal officers and have a search warrant." After waiting 20 to 25 seconds and receiving no response, the federal agent in the company of deputy sheriffs broke the door down and entered the apartment. He saw the appellant seated on a couch stuffing some papers under-

neath the seat, and there was a brown paper bag containing a number of papers at his feet. A copy of the search warrant was given to the appellant approximately twenty minutes before leaving the premises.

It was stipulated that Deputy Sheriff Carl Seltzer would testify that pieces of paper in the brown paper bag and under the cushion of the couch contained notations of purported bets on horse races and figures showing the totalization of wins and losses on the said purported bets.

All of these papers were seized by the federal agent at the said apartment.

Federal Agents Ness and Katayama held a conversation with the appellant at the said apartment on August 15, 1957 in which they asked him what the papers were and the appellant replied that they were betting markers that he picked up from a clerk of Swede's at the Mark's Restaurant auto park. The appellant was asked what he was doing with them, and he replied that he was just figuring the wins and losses and that Swede would come around about 10:00 o'clock each night and pick them up. The appellant stated he was getting $150.00 a week for his services. When asked if he knew he was required to have a wagering stamp, he said he did not need a stamp because he was not a bookmaker [Tr. of Rec. pp. 43-45].

Specification of Errors.

I. The Court erred in not granting the motion to suppress evidence.

II. The evidence was not sufficient to establish the guilt of the appellant.

III. The Government failed to establish the necessary venue.

Questions Presented by Appellant.

I. Should the Court have granted the motion to suppress evidence?

A. Should a search warrant issue unsupported by oath or affirmation to show probable cause?

B. Must an affidavit in support of the issuance of a search warrant set out facts showing the required probable cause?

C. Must the affidavit for the search warrant state facts known to be true from observation?

D. Must the evidence before the Judge or Commissioner who issues the search warrant be such as would be admissible on trial?

E. Should the Courts validate writs issued on sworn declarations based on information and belief or conclusions?

II. Was the evidence sufficient to establish the guilt of the appellant?

A. Did the activities of the appellant show that he engaged in the business of accepting and receiving wagers so as to bring him within the act of Congress requiring a registration and the payment of a wagering occupational tax?

B. Did the appellant wilfully and knowingly violate the law when he did not have knowledge that he was required to register and pay the wagering occupational tax?

III. Did the Government fail to establish venue by failing to show that the appellant engaged in the business of accepting and receiving wagers within the jurisdiction of the Court?

ARGUMENT.

I.

The Court Should Have Granted the Motion to Suppress Evidence.

No search warrant shall issue except upon probable cause supported by oath or affirmation.

United States Constitution, Fourth Amendment.

Probable cause means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.

Stacey v. Emery, 97 U. S. 642, 24 L. Ed. 1035.

Where an affidavit in support of the issuance of a search warrant does not set out facts showing the required probable cause, the motion to suppress evidence seized as a result of the search warrant must be granted.

United States v. Lassoff, 147 Fed. Supp. 944.

The affidavit for the search warrant must state facts known to be true from observation. Courts should not validate writs issued on sworn declaration which literally comply with the terms of the Federal Statute on information and belief or conclusions, instead of positively alleging the material facts.

Ripper v. United States, 178 Fed. 24, 26 (8th Cir.);

Schencks v. United States, 2 F. 2d 185, 186, 187.

The evidence before the Judge or Commissioner who issues the search warrant must be such as would be admissible on trial.

Wagner v. United States, 8 F. 2d 581, 583 (8th Cir.);

Giles v. United States, 284 Fed. 208, 214 (1st Cir.).

The Commissioner must be furnished with facts—not observations, beliefs or surmises.

Veeder v. United States, 252 Fed. 414, 418 (7th Cir.).

When the validity of a warrant was before the Court of Appeals for the First Circuit in *Giles v. United States,* 284 Fed. 208, the Court said that the affidavit should have affirmatively appeared that the affiant had personal knowledge of facts competent for a jury to consider, and the facts, and not his conclusion from the facts, should have been before the Commissioner.

Lockname v. United States, 2 F. 2d 427, 428 (9th Cir.);

Kohler v. United States, 9 F. 2d 23, 25 (9th Cir.).

A search warrant could issue only upon evidence which could be competent in a trial before a jury and of such a nature to lead a man of prudence and caution to believe that the offense had been committed.

Grau v. United States, 287 U. S. 124, 128.

Sworn general statements set forth in the affidavit are not sufficient to warrant a judicial finding of probable cause for the issuance of a search warrant, and therefore the warrant is void.

United States v. Lassoff, 147 Fed. Supp. 944, 949.

In the instant case the search warrant was issued by United States Commissioner Theodore Hocke, based on the affidavit of Special Agent Arthur S. Katayama [Tr. of Rec. pp. 22-23], who incorporated by reference affidavits of Los Angeles County Deputy Sheriffs Howard Fowler and Calvin A. Bublitz [Tr. of Rec. pp. 25-29, 31-33], and an additional affidavit of the said Arthur S. Katayama [Tr. of Rec. pp. 29-31].

It should be noted that the affidavit of Special Agent Katayama states a conclusion rather than ultimate facts when he states: "that he has reason to believe . . . there is now being concealed certain property, namely, betting markers . . ." etc. [Tr. of Rec. p. 25].

The affidavits of Deputy Sheriffs Howard Fowler and Calvin A. Bublitz are replete with hearsay, conclusions, as well as information and belief. A reading of the affidavits [Tr. of Rec. pp. 26-29, 31-33] demonstrates beyond question that the material set forth in the affidavits does not comply with the judicial rulings hereinabove cited to the Court.

The additional affidavit of Special Agent Katayama [Tr. of Rec. pp. 29-31] is based on conclusions when the affiant states that the slips of paper handed to Rutherford by Cupp are betting markers, since at no time was there any showing that the affiant ever identified the pieces of paper as having passed from Cupp to Rutherford, or saw them so as to state what was contained on them.

Phrases contained in the affidavits, such as: "Monica Kissel whom I know by reputation and name to be the girl friend of Charles H. Rutherford" [Tr. of Rec. p. 27]; "Mark Rutherford who is a known notorious bookmaker in this area . . . C. H. Rutherford has taken

over his father's business . . . and has a reputation as being a bookmaker . . ." [Tr. of Rec. p. 28]; "that upon being advised . . . that a person known to the Los Angeles County Sheriffs Office as C. H. Rutherford was conducting large scale bookmaking activities" [Tr. of Rec. p. 29]; "It is my opinion that the slips of paper handed to Rutherford by Cupp are betting markers used by bookmakers" [Tr. of Rec. pp. 30-31]; "the home of C. H. Rutherford who is a notorious bookmaker" [Tr. of Rec. p. 32]; "that Rutherford's *modus operandi* consists of operating a 'relay-back office' operation" [Tr. of Rec. p. 33], are so obviously conclusions and hearsay based on hearsay that no further comment by counsel for appellant should be required to show that such statements would not be admissible at a trial and are not competent to justify the issuance of a search warrant.

II.

The Evidence Was Not Sufficient to Establish the Guilt of the Appellant.

Mere intra-state transportation of gambling material does not establish a crime.

> *Clay v. United States,* 239 F. 2d 196, 199 (5th Cir.).

Congress did not choose to subject all employees of gambling enterprises to the tax and reporting requirements, but was content to impose them on persons actually "engaged in receiving wagers." The occupational tax does not apply to a pick-up man.

> *United States v. Calamaro,* 354 U. S. 351, 357.

The pick-up man no more receives a wager than a messenger who carries records of customers' transactions from

a branch bank to a central office receives deposits. It is the writer and not the pick-up man who is "engaged in receiving wagers".

United States v. Calamaro, 354 U. S. 351, 355.

In the instant case all the evidence shows is that the appellant did not register or pay a wagering occupational tax [Tr. of Rec. p. 43]; and that he was seen on several occasions to receive papers in an auto park [Tr. of Rec. pp. 43-44]; and that papers identified as containing purported bets on horse races were seized by a Federal Agent at an apartment where the appellant was arrested [Tr. of Rec. pp. 44-45].

However, when the appellant was asked what he was doing with the papers he replied that he was just figuring the wins and losses, and that he did not need a stamp because he was not a bookmaker [Tr. of Rec. p. 45].

Where the prosecution presents as part of its case defendant's statement, the State was bound by that evidence in absence of proof to the contrary.

People v. Coppla, 100 Cal. App. 2d 766, 769, 224 P. 2d 828;

People v. Griego, 136 Cal. App. 2d 51, 56; 288 P. 2d 175.

Giving the Government the full benefit of the evidence submitted, it is respectfully urged that the evidence only shows that the appellant picked up pieces of paper, was found in possession of purported bets on horse races, and stated that he had figured the wins and losses for someone else.

The evidence does not show that the appellant wilfully and knowingly failed to register and to pay the tax "well

knowing" that he was required to do so. The evidence does not show that the defendant "engaged in receiving wagers" within the meaning of the *Calamaro* case.

Since the Government introduced evidence of a conversation held with the appellant, it is bound by that conversation in the absence of proof to the contrary.

Title 26, United States Code, Section 4401c, provides:

> ". . . each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax . . . on all wagers placed with him . . ."

The Government failed to establish that the appellant "engaged in business" within the meaning of Section 4401c of Title 26, United States Code.

"Engaged in business" means conducting, prosecuting and continuing business by performing progressively all the acts normally incident thereto.

> *Supreme Malt Products Co. v. United States,* 153 F. 2d 5, 6;
>
> *Lewellyn v. Pittsburgh B. & L. E. R. Co.,* 222 Fed. 177, 185, 186.

In the absence of evidence that the appellant had knowledge that he was required to register and pay the wagering occupational tax (the Information charges "well knowing these facts") [Tr. of Rec. p. 3], the evidence is insufficient to show a wilful and knowing violation of the law.

III.

The Government Failed to Establish the Necessary Venue.

The information was filed in the United States District Court, Southern District of California, Central Division [Tr. of Rec. p. 3].

The Information charged that the registration and payment of tax was required to be made to the District Director of Internal Revenue at Los Angeles, California, within the Central Division of the Southern District of California [Tr. of Rec. p. 3].

The Government failed to produce evidence to show that the appellant engaged in the business of accepting wagers within the Central Division of the Southern District of California. The evidence merely showed that he was arrested in the area affected, and that papers containing purported bets were found in the apartment with the appellant where he was arrested. However, the evidence does not show that the purported wagers were received within the venue of the Court, nor does the evidence show that appellant engaged in the business of accepting wagers within the venue of the Court.

Conclusion.

It is respectfully submitted that the judgment of conviction and the order denying appellant's motion for a new trial should be reversed, and that the District Court be directed to suppress the evidence seized without a bona fide search warrant.

Respectfully submitted,

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APPENDIX.